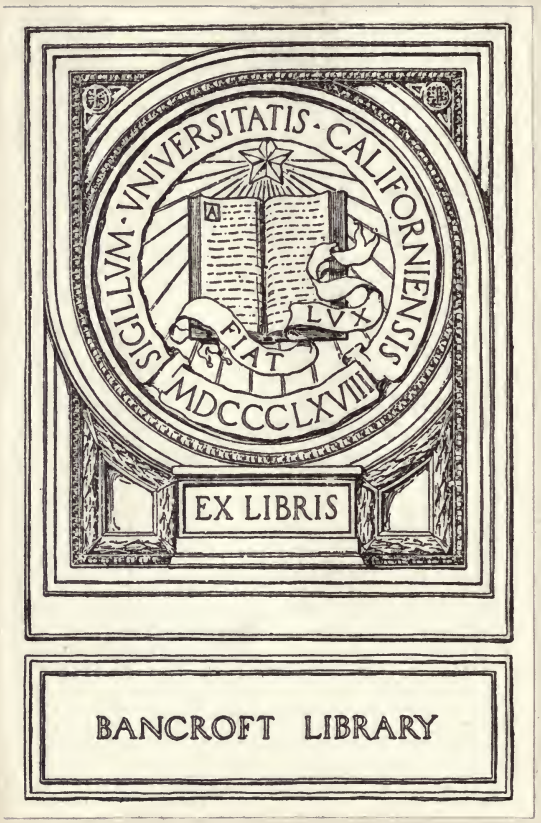
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V.—UNITED STATES PROVISIONAL COURT FOR THE STATE OF LOUISIANA, 1862-1865.

By Judge CHARLES A. PEABODY.

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One of the evils to which a nation at war is exposed is that of accidentally and unintentionally doing injury or giving offense to nations other than the one with which it is at war. A hostile or offensive act is seldom intended under such circumstances, but in exerting every faculty and power with all possible energy against an enemy it must often happen that the rights or sensibilities of another nation, or of its subjects whose interests the nation is bound to protect, may receive diminished consideration and be unintentionally encroached upon. Under such circumstances the demand of friendly nations for careful observance of the rules of international etiquette should no doubt be somewhat relaxed in estimating the acts of parties absorbed in the contest. Much is to be overlooked or excused which, under circumstances more favorable to deliberate consideration, would be treated differently; and if reparation be demanded by a party injured or offended it is to be done in a tone less imperious than would have been appropriate if the party complained of had been at peace and had all the usual opportunity of a nation at peace for acting deliberately.

But with all the mitigation which can be hoped for in the fact that the author of the offense, real or fancied, was unable under the circumstances to act with deliberation, a controversy with another nation is a very serious matter, and the gravity of such a controversy is enhanced almost incalculably to a party by the fact that it is already engaged in war with another adversary.

The case of the capture of Mason and Slidell from the *Trent* in the late war in the United States, by error of a commander in the Navy acting on his impression of duty at the moment, without opportunity for instructions or deliberation, sent a thrill, almost of horror, through the veins of every enlightened

friend of the United States because of the condition of the country at the time, it being then engaged in war; and notwithstanding the fact that the nation whose sensibilities were wounded was great and powerful beyond any other nation of the world, and being without temptation to extravagant self-assertion, might reasonably be expected to be magnanimous and even considerate in asserting itself against a junior blood relation, immersed and struggling as if for life, in that most disheartening of national contests—resembling family discord, a house divided against itself—civil war.

After the passage of the forts on the Mississippi River below New Orleans by a fleet of the United States under command of Admiral Farragut, bearing a military force under command of Maj. Gen. Butler, during the late war in the United States and about May, 1862, the surrender of New Orleans to the forces of the United States followed almost immediately. The means relied on by the Confederate government for protection of the city and the country in that region against aggression by the Army and Navy of the United States, namely, the two forts on the Mississippi River, the chain cable across the river and the naval force of the Confederates above it, acting in concert, being overcome by the masterly skill of Farragut, the only course left to the city, on the arrival of the fleet before it, was to surrender, and that course was adopted at once. The city and much of the territory of the State of Louisiana and neighboring States came at once into the control of the Army of the United States and was held by it in armed belligerent occupation—constituting the Department of the Gulf—until the end of the war in 1865, the headquarters and central point of the department being Louisiana and in it New Orleans.

During that time the United States, having sole authority, had to administer government there as best it could in local and internal matters. It had of course to encounter the usual difficulties of extemporizing a system provisional in its character.

Situated as it was in the interior of the country and having no territorial contact or intercourse with any other nation or government, it might seem likely to be free from danger of controversial issues, or being the occasion of them, with other nations and governments; and so it proved to be as to questions that might ordinarily be supposed likely to arise from location in reference to other governments or their territorial possessions or claims.

There was a class of cases however between the United States and foreign governments and like most international questions having a grave character, especially to a nation at war, with all its energies already taxed to their utmost against an avowed enemy, which cases had their origin in New Orleans and which gave to the Government of the United States a great deal of anxiety in respect to its relations with the governments of several nations. It was the pressure arising from those cases and the danger of international complications liable to grow out of them that brought into existence the United States Provisional court for the State of Louisiana, on the application of the Department of State under the administration of Mr. Seward, Secretary of State, for relief from the labor and anxiety to which the Department were subjected by them.

The business of New Orleans at the time of the breaking out of the late war was very large. The commerce of the Mississippi River and its tributaries had its terminal point and focus there. That commerce was very extensive. The numberless steamers of those days plying the waters from the head of navigation on the Mississippi, Missouri, Arkansas, Ohio, Tennessee rivers, and other streams tributary to them, affording tens of thousands of miles of navigable waters, bearing the products of the immense territory drained by those streams and their numerous tributaries, extending from the crest of the Allegheny Mountains on the east to the crest of the Rocky Mountains on the west, all deposited their cargoes at New Orleans. There was in those days no other outlet for their products to the ocean and the outer world. Railroads had not begun to do that transportation, and all the exports of that vast region had to pay tribute to New Orleans. There they were received by merchants to whom they were consigned, and after being sold for exportation and having changed owners, perhaps more than once, were reshipped in ocean vessels by way of the Gulf of Mexico to the ocean and the markets of the world.

The capital on which the commercial business of New Orleans had been transacted had always been largely foreign, and owned by bankers and capitalists residing abroad in various commercial countries of Europe, and some of them in countries other than the United States, on this Western Continent. The population in Louisiana of foreign birth was also quite numerous, and they had not been accustomed to naturalize and re-

nouncing all claim to the protection of the governments of the countries whence they came, to acquire the rights of citizenship in this country, like the foreign-born population of the Northern States of the Union. Large numbers of men dwelling and engaged in business there from France, Spain, Italy, and islands of the Mediterranean and other countries, still remained subjects of the governments of the countries from which they had migrated and claimed right to the protection of those governments.

The business of New Orleans and the capital invested in it necessarily suffered much from the war and the transfer of the government from the peace footing of the State under which the business carried on there had prospered, to the war footing of the United States under which great losses had been sustained. As has been said, that capital was owned largely by subjects of foreign governments.

Those losses and injuries, many of them caused by the necessary action of the new governing power, became subjects of claims against the Government of the United States. Those claims were urged upon the representatives of the United States Government in New Orleans with the aid of consuls of the governments of the respective claimants, and relief being refused, the aid of the governments themselves was invoked and by those governments the claims were placed in the hands of their ministers resident at the seat of Government of the United States and there urged upon the Government of the United States before the Department of State.

The questions raised by them, urged at first by the consuls for their respective governments before the military authorities at New Orleans, and afterward by their ministers at Washington before the General Government had become so numerous and required so much and so careful attention from the Secretary of State that he found it impossible to attend to them there, and also thought the foreign relations of the Government greatly endangered by the course they took.

Mr. Seward, then Secretary of State, said that from the time of the capture of New Orleans, in May, 1862, to the establishment of this court, more than half of his time had been occupied most anxiously with these questions, many of them of the most intricate and delicate character; and it was thought by him to be indispensable that there should be some tribunal or person on the spot capable of deciding and ending such questions of an

international character, and liable at all times, while they remained undecided, to become subjects of serious international controversy.

It may be remembered by some of our readers that a case of the kind above referred to occurred in the summer of 1862, a short time prior to the establishment of this court, which Mr. Reverdy Johnson, of Baltimore, one of the most distinguished lawyers of the country, was sent to New Orleans by the Federal Government, at the instance of the State Department, to investigate. That case arose on the claim of a Greek commercial house, Rodocorachi & Franghiadi, to a quantity of sugar which had been seized by the military authorities on the ground that it had been acquired or was destined to be used in aid of the rebellion. The case having been decided adversely to the claim of the Greek merchants by the military authorities at New Orleans, the aid of their Government was invoked and the claim was pressed before the Department of State at Washington by the representatives of the Greek Government resident there, and had become a matter of grave interest with the two governments.

To afford relief to the Government at Washington, and (what was deemed of much greater importance at the time) to have all such questions, thereafter to arise, passed upon and ended before they should reach the portfolios of foreign governments or the State Department of our own and assume the gravity of questions pending between the governments of the two nations, it was thought expedient to have some tribunal or person on the spot capable of examining claims of the kind and deciding upon and ending them. To effect that purpose the establishment of the United States provisional court of the State of Louisiana, with powers adequate to every emergency possible and whose decisions should be conclusive in all cases, was resolved on. All claims of the kind above referred to could be prosecuted before this court, and it was made the tribunal of the Government for its examination and decision of them. If urged elsewhere on a representative of the Government the officer to whom they were presented must order them to this as the tribunal ordained by the Government for examining and deciding them.

The tribunal desired was created by the following order of the President of the United States and the Commander in Chief of the Army thereof.

EXECUTIVE ORDER ESTABLISHING A PROVISIONAL COURT IN LOUISIANA.

EXECUTIVE MANSION,
Washington, October 20, 1862.

The insurrection which has for some time prevailed in several of the States of this Union, including Louisiana, having temporarily subverted and swept away the civil institutions of that State, including the judiciary and the judicial authorities of the Union, so that it has become necessary to hold the State in military occupation; and it being indispensably necessary that there shall be some judicial tribunal existing there capable of administering justice, I have, therefore, thought it proper to appoint, and I do hereby constitute, a provisional court, which shall be a court of record for the State of Louisiana, and I do hereby appoint Charles A. Peabody, of New York, to be a provisional judge to hold said court, with authority to hear, try, and determine all causes, civil and criminal, including causes in law, equity, revenue, and admiralty, and particularly all such powers and jurisdiction as belong to the district and circuit courts of the United States, conforming his proceedings, so far as possible, to the course of proceedings and practice which has been customary in the courts of the United States and Louisiana—his judgment to be final and conclusive. And I do hereby authorize and empower the said judge to make and establish such rules and regulations as may be necessary for the exercise of his jurisdiction, and to appoint a prosecuting attorney, marshal, and clerk of the said court, who shall perform the functions of attorney, marshal, and clerk, according to such proceedings and practice as before mentioned, and such rules and regulations as may be made and established by said judge. These appointments are to continue during the pleasure of the President, not extending beyond the military occupation of the city of New Orleans, or the restoration of the civil authority in that city and in the State of Louisiana. These officers shall be paid out of the contingent fund of the War Department compensation as follows. * * * Such compensations to be certified by the Secretary of War. A copy of this order, certified by the Secretary of War and delivered to such judge, shall be deemed and held to be a sufficient commission. Let the seal of the United States be hereunto affixed.

ABRAHAM LINCOLN.

By the President:
WILLIAM H. SEWARD,
Secretary of State.

The power conferred on the court constituted by this order, would seem to be the unlimited power of determining every question that could be the subject of judicial decision and to make its decision conclusive of the rights and obligations of all parties, including, of course, the Government itself. It was not limited to the class of cases interesting in reference to the foreign relations of the Government, on account of which it was instituted. That class of business was not specially referred to in the Executive order and it was not desirable that

attention should be called to it by the language of the order.

The organization of the court was proceeded with at once, the judge appointing a prosecuting attorney, marshal and clerk, and all preparations were made before proceeding to the field of action. Thus completely organized and ready for business, as authorized by the President and Commander in Chief of the Army of the United States, for the exercise of its functions in territory held in armed belligerent occupation by the Army under his command, the court proceeded by Government transport, under convoy, from New York to New Orleans, the headquarters of the Department of the Gulf. Arriving there early in December, 1862, it proceeded as soon as proper arrangements could be made to do business.

Claims of foreign governments of the kind above described, which had hitherto caused great anxiety to the Government at Washington, ceased to be presented there shortly after this court commenced business, it was said by the Secretary of State, and the relief sought for the government and department was attained.

The court then proceeded to do business as a court of general jurisdiction.

Commissioned broadly to administer justice, and no rule or law for its action being prescribed it was left to the court to decide by what law it would be governed. It decided to adopt, as the rule of its action, in ordinary litigation between man and man, the law theretofore of the State of Louisiana; as being the law under which the transaction to be adjudicated had many of them been had and also because it seemed probable that that law, having had the sanction of the previous government, would be best suited to the business and interests of the inhabitants and persons interested in business and property there. This, however, the court announced would only be the general rule, and the court would decide in each case whether reason existed for a departure from the law of the State in order to the attainment of the fullest justice, and would make exceptions wherever sufficient reason for it existed.

The executive power of this court was one of its most attractive features. For this purpose it had always at its command the entire physical force of the United States within the department. The marshal of the court, bearing its process, had a pass everywhere within the Federal lines, and was

furnished every facility and all the power demanded for the execution of its orders. Commanders of stations, military and naval, were instructed to afford him every aid. On land, a military escort as large as necessary for his purpose, and on water, transports and gunboats were at his command, and transportation to the utmost extent of the capacity of the Government at the particular place. He even penetrated the enemy's lines for miles, sometimes with a large escort of hundreds and perhaps thousands of men, cavalry and infantry, and brought from within those lines into the custody of the court, cotton, sugar, and other property demanded by the process he bore, for adjudication between litigants. Private boats navigating the Mississippi and other rivers, and the bayous, lakes, and other waters of that aqueous State were ordered to land him and at his signal to stop and take him on board, wherever he required them to; even at places at which they were not otherwise allowed, by the military regulations of the department, to land.

A short time before this court terminated its labors a deputy marshal having process to serve in the vicinity of Morganza, a military station and depot on the Mississippi River above New Orleans, obtained access to the general in command there, and asked for an escort to take him to a point in the interior where his process was to be served. The general examined the process of the court held by the marshal, and said that the escort was at his service; that it would require a thousand cavalry to escort him there safely; that he had them, however, and they would be ready for him whenever he desired to move. A deputy marshal of the court, during the siege of Port Hudson, in 1863, said that he thought an escort he had on one occasion embraced several thousand men.

The necessity for tribunals for the decision of controversies between contending parties and for the administration of justice generally was felt immediately after the occupation of the city by the Federal Army, and provision had been made for the supply of that want before the United States Provisional court, for the need of such an institution had been considered.

A striking illustration of the necessity for judicial action in such a case is afforded by the history of the Provost court (the first to be established there, and for a considerable time the only one) in its gradual extension of jurisdiction brought about by the necessities of the case.

About June, 1862, and a few days or weeks after the occupation of the city of New Orleans by the Federal Army, a court was established, called the Provost court of the Army of the United States for the city of New Orleans, having at first as its name imports powers only to decide questions relating to the Army occurring in New Orleans. From time to time other questions, not connected with the Army, were referred to this court by military officers in command there, and particularly such as related to matters of police and the punishment of crimes generally; and the jurisdiction of that court over cases of that kind, from frequent repetition of reference of them to it, became habitual and came to be deemed constitutionally inherent in the court.

Very soon that court exercised unquestioned jurisdiction of all criminal cases arising in the city of New Orleans and in all other parts of Louisiana held in military occupation by the Federal arms.

Shortly after this acquisition of jurisdiction, civil matters, in the absence of courts formally endowed for such business, were referred from time to time to this court for decision (ex-necessitate, it might almost be said) by officers in command, and in the same manner a general jurisdiction in civil matters was gradually established and recognized by the Government there and the court and citizens.

Things remained much in this condition until late in the summer of 1862, the Provost court under Maj. Joseph M. Bell, a member of Gen. Butler's staff, being the only court there and that court exercising beneficently jurisdiction acquired in the manner above stated, in cases of almost every description—making orders in the nature of injunctions; administering estates of deceased persons; appointing guardians of infants and administering their estates, and appointing, removing, and controlling trustees of other trusts.

About that time other courts having civil jurisdiction were established and set in motion.

There were reasons in the magnitude and importance of the business of New Orleans and the fact that the business transacted in that city could not be done elsewhere, but must be done there, at that the only point at which the internal commerce of that vast territory, drained by the Mississippi and its innumerable affluents, could meet the extraterritorial and international commerce of the world, why elaborate and careful

provision should be made these for government and the protection of pecuniary and personal rights.

The necessities of commerce, however, and the general wants of the inhabitants in their dealings and intercourse, had already received such attention from the power-administering government there, in the establishment by the military governor of Louisiana, of courts for the decision of questions usually arising in such cases. Several of the identical courts, styled first, second, and third district courts of the parish of Orleans, in use before the surrender of the city—courts established and operated under the State government prior to the conquest, and therefore presumptively well suited to the wants of business and society there—had been rehabilitated; new and competent judges and other officers had been appointed, and the courts set in motion under the authority of the Federal Army; and those courts were then doing business in much the same manner under the new government as before the conquest while under the State government.

This setting in motion those old courts under a motive power, seemed like an appropriation by the new governing power, of governmental machinery of the Confederate State, embraced (it might be said fancifully) in the surrender made to the Federal Government just after its forces had passed the forts on the Mississippi and appeared before New Orleans.

This was the condition of things when in December, 1862, the judge of the United States Provisional court for the State of Louisiana, and the officers appointed by him, the prosecuting attorney, marshal, and clerk, arrived in New Orleans, from New York, ready for business.

The courts then in operation were performing duty in dispensing justice satisfactorily.

The parts of the State held by the Federal arms, outside the parish of Orleans, however, had no courts, civil or criminal, and no process from the courts of the parish of Orleans went thither. No local courts could well be maintained there, for the tenure of the country by the Federal Army was not permanent, but fluctuated from time to time. At one time, and for months together, a tract of country, embracing several parishes or counties, would be held by the Federal Army, and at another time, another part of the State, of equal extent, would be so held, and these districts, one after another, by the retirement of the Federal Army from them, were left to govern

themselves as best they might, and perhaps sometimes returned to the occupation and control of the Confederate army. This had been the case at different times to such an extent that, perhaps, no considerable part of the State, except the city of New Orleans and the country in the immediate vicinity, was uniformly held by the Federal Army after its first capture. A central court, therefore, with power to bring litigants to itself, and whose operations practically would expand and contract with the flow and ebb of the Army, was a great desideratum, and almost indispensible to the administration of justice in those parts of the State. That want was supplied by the United States provisional court.

Immediately after the United States Provisional court opened its doors for business generally it was occupied with business of the first magnitude, and by none was it received with greater favor than by those in sympathy with the rebellion and unfriendly to the Federal Government. These disloyal people seemed to entertain distrust of the local courts, the judges in which had been selected from the class of residents in Louisiana opposed to the rebellion and friendly to the Federal Government. Considering themselves as under the ban of the existing government, to which they had been and continued to be inimical, they apprehended unfair treatment from judges between whom and themselves, as members of opposing parties, animosities or prejudices might exist, and at any rate were said to be feared by them. They had no distrust of the, kind in respect to this court however, officered as it was by strangers to their local feuds or antipathies.

The district courts of the parish of Orleans, several of which had recently been set in motion in New Orleans by the occupying force, had been a part only of the old system of judiciary for the State. That system had also embraced a court of review, known as the Supreme court of Louisiana, the court of last resort in all cases.

From all other courts of the state appeals had laid in former times to the Supreme court. Accordingly those courts, considering the Supreme court as still a part of their system, held that their decisions were subject to review by the Supreme court, and on appeals being taken in accordance with the practice theretofore existing those courts treated them as regular and stayed proceedings on the judgments appealed from until decision by the appellate court.

The Supreme court had not been organized or set in motion since the establishment of the Federal authority there.

Under these circumstances the power of the United States Provisional court to entertain appeals from the judgments of the other courts and reverse, affirm, or modify them was at once perceived, and an effort was made to induce that court to entertain such appeals generally and review the judgments and dispose of them finally. The court declined, however, to make any general order on the subject, not doubting its authority, but deeming such action inexpedient.

The necessity for a court which should have power to review these cases and dispose of the appeals accumulated led, some time afterward, to measures for the organization of the Supreme court of Louisiana, and Judge Peabody, having already under his previous commission much greater powers than would be needed in that position, was made chief justice of that court.

The United States Provisional court for the State of Louisiana was brought to a close by the termination of the war and of the military occupation of the Federal army in 1865, and its judgments were transferred to and made judgments of the circuit and district courts of the United States by act of Congress of July 28, 1866 (*see* U. S. Statutes at Large, Vol. XIV, p. 344).